A

UNIVERSITI KEBANGSAAN MALAYSIA v. ZURICH TAKAFUL MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[SUIT NO: WA-22NCC-534-12-2021]
12 MARCH 2025

B

Abstract – *An insurer is entitled to repudiate liability under an insurance policy, if the insured fails to disclose circumstances known to them at the time of proposing for coverage that could give rise to a claim, and if the policy explicitly excludes coverage for such known circumstances. This breach, stemming from a warranty that all information provided is true and accurate and no information has been withheld, allows the insurer to repudiate the contract, particularly when the undisclosed incident falls within an exclusion clause of the policy.*

C

D

INSURANCE: *Policy – Repudiation – Insured provider of medical services – Insured completed proposal form for insurance policy – Insurance policy aimed at indemnifying insured against any claim, inter alia, for breach of professional duty in provision of any medical service – Alleged act or omission occurred after retroactive date stated in Schedule – Insured failed to disclose circumstance that might lead to claim when proposing to insurer for coverage – Insurer repudiated liability upon discovery that there was legal claim – Whether there was breach of basis clause – Whether such breach would entitle insurer to repudiate liability or involvement in suit against insured*

E

F

The plaintiff completed a proposal form for Medical Malpractice Indemnity Takaful ('MMIT') coverage and handed the same to a representative of PNSB Insurance Brokers Sdn Bhd ('PNSB'), an insurance broker who, in turn, submitted the proposal to the defendant for evaluation. The insurance was to indemnify the plaintiff against any claim, *inter alia*, for actual or alleged breach of professional duty in provision of any medical service by reason of any act, error or omission committed or allegedly committed by the plaintiff provided that the alleged act or omission occurred after the retroactive date stated in the Schedule. The plaintiff, however, made no mention in the proposal form of the incident involving medical negligence and malpractice ('Henry Siang incident') and the fact that there was an internal investigation meeting for the said incident. The defendant proceeded to issue MMIT. The plaintiff was later served with a writ of summons filed by Henry Siang ('Suit 795'). The plaintiff then served a notification of claim form to the defendant. PNSB informed the defendant about Suit 795 and the defendant appointed a legal firm to represent the plaintiff in the said suit. During interrogations, the plaintiff admitted to the said legal firm that there was indeed an internal investigation meeting for the Henry Siang incident and

G

H

I

the plaintiff was aware that the Henry Siang incident was a circumstance that might give rise to a claim. This resulted in the defendant repudiating liability for Suit 795. Suit 795 was concluded in favour of Henry Siang. Hence, the present action where the plaintiff sought to recover the judgment sum paid and the legal cost spent on Suit 795. The issues that arose for determination were: (i) whether there was a breach of the basis clause; and (ii) whether such breach would entitle the defendant to repudiate the contract.

Held (dismissing claim):

(1) The basis clause created warranties on the part of the plaintiff that the statements or information given in the proposal form were true and accurate. The proposal form was not, in any manner, vague or unclear. There was a declaration clause in the proposal form. It was on these express wordings that of the declaration clause that the plaintiff had assured the defendant that they had given all information as true and no information was withheld. This was the warranty that the plaintiff had given. The plaintiff, however, failed to disclose a critical issue, namely the Henry Siang incident. Therefore, there was an omission on the part of the plaintiff when it failed to inform about the Henry Siang incident when the MMIT was renewed. (paras 16, 19, 20, 25, 29 & 31)

(2) Clause 2.1.5 of the insurance policy specifically stated that the certificate would not indemnify the plaintiff against any claim made against the plaintiff in respect of any complaint or circumstances which might give rise to a claim that was known to the plaintiff at the inception date of the insurance contract. The following clearly left an indication that there might be potential legal action: (i) the legal firm representing Henry Siang had written to the plaintiff requesting for copies of the medical record; and (ii) an internal investigation meeting was held to discuss the medical malpractice of the Henry Siang incident. This was further fortified by the plaintiff's own admission to the legal firm appointed by the defendant. The clear words of cl. 2.1.5 of the insurance policy offered no refuge to any interpretation that there could be selective disclosure. As such, a claim such as the Henry Siang incident was clearly excluded under cl. 2.1.5. Suit 795 was not covered under the MMIT. The defendant was therefore entitled to repudiate its liability or involvement in Suit 795. (paras 39, 43-45, 47, 48 & 50)

Case(s) referred to:

American International Assurance Company Ltd v. Nadarajan Subramaniam [2013] 5 CLJ 697 CA ***(refd)***

ING Insurance Bhd v. Rathinasamy Kasinathan [2018] 10 CLJ 488 CA ***(refd)***

For the plaintiff - Sharmini Navaratnam & Nabilah Farhanah; M/s Siva Dharma & Assocs

For the defendant - Tan Boon Wee & Emily Chong; M/s Othman Hashim & Co

Reported by Najib Tamby

A

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Introduction

B **[1]** This claim was brought by the plaintiff who has under its stable of entities a hospital, Universiti Kebangsaan Malaysia Medical Centre ("UKMMC"), against the defendant, an insurer, under a Takaful insurance policy. The plaintiff had been found liable for medical negligence in an action brought by one of UKMMC's former patients. Having failing to reverse the decision on appeal, the plaintiff then sought indemnity from the C defendant as their insurer under the Medical Malpractice Indemnity Takaful ("MMIT") policy. It is an insurance to indemnify the plaintiff against any claim, *inter alia*, for actual or alleged breach of professional duty in provision of any medical service by reason of any act, error or omission committed or allegedly committed by the plaintiff provided that the alleged act or omission D occurs after the retroactive date stated in the schedule. The defendant refused to indemnify on the grounds that the plaintiff breached the basis clause of the policy which entitled them to repudiate liability on the terms and condition of the Takaful policy.

[2] At the conclusion of the trial, I dismissed the claim on the basis that E the plaintiff failed to disclose a circumstance that might lead to a claim when the plaintiff proposed to the defendant for coverage.

Brief Background

[3] On 10 March 2015, the plaintiff completed a proposal form for the F MMIT coverage and handed to a representative of PNSB Insurance Brokers Sdn Bhd ("PNSB"), an insurance broker, who in turn submitted the proposal to the defendant for evaluation. The plaintiff made no mention of any facts about the incident involving Henry Siang Len ("Henry Siang Len incident") in the proposal form despite having knowledge of that incident involved medical negligence and malpractice and the fact that there was an internal G investigation meeting for the incident on 2 March 2011.

[4] Based on that proposal form, the defendant then issued MMIT dated 22 December 2015 with Certificate No. 011550009770-01 for the period from 8 December 2015 to 7 December 2015.

H **[5]** On 21 December 2016, the plaintiff was served with a writ of summons bearing No. WA-22NCVC-795-12/2016 filed by Henry Siang Len who was represented by Messrs PS Ranjan (hereinafter referred to as the "Suit 795").

I

[6] Upon receiving the said writ of summon and statement of claim, the plaintiff then served PNSB a letter dated 21 December 2016 enclosed with a notification of claim form dated 21 December 2016. In the notification of claim, it was stated that the date of work done out of which the claim arises was 21 December 2016.

[7] PNSB then informed the defendant about the civil claim brought based on the Henry Siang Len incident. The defendant appointed Messrs Azim, Tunku Farik & Wong to represent the plaintiff in the Suit 795 until 6 April 2018.

[8] On 12 March 2018, Messrs Azim, Tunku Farik & Wong sent an e-mail asking the plaintiff a series of question regarding to the Henry Siang Len incident. *Via* an e-mail dated 13 March 2018, the plaintiff admitted that there was an internal investigation meeting for Henry Siang Len incident held on 2 March 2011 and the plaintiff became aware that the Henry Siang Len incident is a circumstance that might give rise to a claim on 7 December 2015 *ie*, when the plaintiff received a letter from Messrs PS Ranjan requesting for the medical records of Henry Siang Len.

[9] Upon finding out the true state of affairs about the Henry Siang Len incident, the defendant then sent an e-mail dated 4 April 2018 to PNSB stating that the Suit 795 is not covered under the policy. PNSB forwarded the same e-mail to the plaintiff on the same day. In effect, the defendant had repudiated liability for Suit 795.

[10] Suit 795 was concluded with a judgment in favour of Henry Siang Len. The plaintiff and Henry Siang Len then appealed against the High Court's decision to the Court of Appeal. Both the appeals were heard together with the Court of Appeal allowing in part the appeal by Henry Siang Len and dismissing the plaintiff's appeal.

[11] The plaintiff then commenced this action against the defendant to recover the judgment sum paid and the legal cost spent on Suit 795.

Issues For Determination

[12] The issues for determination can be narrowed down to two;

(i) first issue: Whether there was a breach of the basis clause; and

(ii) second issue: Whether such breach would entitle the defendant to repudiate the contract.

Analysis And Findings

[13] The two issues will be dealt *seriatim*.

The First Issue: Whether There Was A Breach Of The Basis Clause

[14] It is almost axiomatic that all insurance contract contains a declaration that full disclosure has been made. It is akin to a warranty that is given by the potential insured that all answers in the proposal form have been made truthfully. The answers given would form the basis of the contract between the insured and the insurer.

[15] The Court of Appeal in *ING Insurance Bhd v. Rathinasamy Kasinathan* [2018] 10 CLJ 488; [2018] 2 MLJ 369 cited the *Principles of Insurance Law* (6th edn), published by LexisNexis and explained as follow:

> [26] In this connection, we would also refer to the book entitled *Principles of Insurance Law* (6th edn), published by LexisNexis, in which the learned author Poh Chu Chai had also explained at p. 237 what is a basis clause and how it operates in an insurance contract:
>
> > A proposer who applies for an insurance policy is under a duty to disclose to an insurer all information considered to be material by a prudent insurer. In addition to an insured's duty to disclose material information, an insurer may also elicit material information from an insured through the questions in a proposal form. In a proposal form, an insured is required to make statements of fact and sometimes also statements of opinion pertaining to the risk to be insured. *An insured is invariably made to warrant the truth of the statements given in the proposal form*. This is done by incorporating what is popularly known as the *basis clause*. A typical basis clause reads as follows (see *Lee v. British Law Insurance Co Ltd* [1972] 2 Lloyd's Rep 49):
> >
> > > I warrant that the above statements made by me or on my behalf are true and complete and I agree that this proposal shall be the basis of the contract between me and the company.
>
> The use of a basis clause is by far the most common way warranties are created in an insurance contract. *When an insured warrants the truth or accuracy of the statements given in a proposal form, the insurer is entitled to avoid the contract ab initio if the statements are inaccurate even though they have no effect on the insured risk.* The insurer is *not obliged to show any causal link between the misstatement and the loss which takes place*. Equally, if there is a misstatement in a proposal form containing a basis clause, the insurer is also not obliged to show that the misstatement constitutes a fact material to the risk insured, namely, that the information would have influenced a prudent insurer in his decision whether to take on the risk or the amount of premium to be charged for undertaking the risk. (See *Dawsons, Ltd v. Bonnin And Others* [1922] 2 AC 413 and *Mackay v. London General Insurance Co Ltd* (1935) 51 Ll L Rep 201).

[16] It follows that the basis clause created warranties on the part of the plaintiff that the statements or information given in the proposal form are true and accurate. Any misstatement or non-disclosure on the proposal form gives the defendant a right to repudiate its liability.

[17] The plaintiff as an insured is duty-bound to disclose all material facts in the proposal form. In fact, such a duty has been made a term of the insurance contract. This can be seen in duty of disclosure clause in the Takaful certificate dated 22 December 2015:

> Duty Of Disclosure
>
> Where the participant has applied for this Takaful wholly for purposes related to the participant's trade, business or profession, participant has a duty to disclose any matter that the participant knows to be relevant to the decision of the company in accepting the risks and determining the rates and terms to be applied and any matter a reasonable person in the circumstances could be expected to know to be relevant otherwise it may result in avoidance of the participant's contract of takaful, refusal or reduction of the participant's claim(s), change of terms or termination of participant's contract of takaful.
>
> Participant also has a duty to inform the company immediately if at any time after participant's contract of takaful has been entered into, varied or renewed with the company any of the information given in the proposal form (or when participant applied for this takaful) is inaccurate or has changed." (Hereinafter referred to as "the Duty of Disclosure Clause").

[18] In other words, the plaintiff is under a duty to disclose any matter that the plaintiff knows to be relevant to the decision of the defendant in accepting the risks and determining the rates and terms of the insurance contract. Failing which, will result in the plaintiff's claim being avoided by the defendant.

[19] In this current case, there is a declaration clause in the proposal form (hereinafter referred as the "said declaration clause") which reads as follows:

> I/We hereby declare that the above answers and statements are true, and that I/We have withheld no information whatever regarding this Proposal. I/We agree that this Declaration and the answers above given, as well as any proposal or declaration or statement made in writing by Me/Ourselves or anyone acting on My/Our behalf **shall form the basis of the Contract between Me/Ourselves and MAA Takaful Berhad**, and I/We further agree to accept Indemnity subject to the conditions in and endorsed on the Certificate.
>
> (emphasis added)

[20] It is on these express wordings that the plaintiff had assured the defendant that they have given all information as true and no information is withheld. This is the warranty that the plaintiff has given.

[21] With such warranty, an insurer such as the defendant will then assess that risk and determine whether to accept the proposal and fix the appropriate premium to be paid in order to be covered by the insurance.

[22] According to the said declaration clause, the statement made in the proposal form is to form the basis of the insurance contract (Takaful certificate) dated 22 December 2015 issued by the defendant.

[23] Reference is again made to the Court of Appeal decision in *American International Assurance Company Ltd v. Nadarajan Subramaniam* [2013] 5 CLJ 697; [2013] 5 MLJ 195, where Mah Weng Kwai JCA held as follows:

> (2) Part IV of the insurance policies clearly stated that *the proposal forms shall be the basis of the insurance policies. The insured was therefore bound by the warranty in each of the three proposal forms that the answers given were true and that the answers would form the basis of the contract between the insured and the appellant*. In the case of *Pacific & Orient Insurance Co Sdn Bhd v. VR Kathirvelu*, the court was not concerned with the 'basis clause' when concluding that the non-disclosure was not material, whereas in the instant case, the 'basis clause' was applicable to the contract of insurance entered into between the insured and the appellant (*China Insurance Co Ltd v. Ngau Ah Kau*; folld) (paras 23 & 28).
>
> (emphasis added)

[24] The warranty which was made in the proposal form. Any misstatement or non-disclosure in the proposal form gives the defendant a right to repudiate its liability.

[25] It is not disputed from the facts that the plaintiff did sign the proposal form which for all intents and purposes warrants the truth or accuracy of the statements given therein.

[26] The proposal form was not in any manner vague or unclear. Reference is made to question 11 in Section F of the proposal form, where it states:

> List any circumstances/complaints which may give rise to a claim or suit being made against the Establishment.

[27] The plaintiff had attached a list at the back of the proposal form, and the list made no mention of the Henry Siang Len incident. This fact is also confirmed by the PW1, the person who filled in that part of the proposal form.

[28] It follows that the basis clause created warranties on the part of the plaintiff that the statements or information given in the proposal form are true and accurate.

[29] Despite such an unambiguous requirement for an express declaration and warranty, it is my finding that the plaintiff failed to disclose a critical issue namely the ketamine overdose of Henry Siang Len. This overdose incident was not something that the plaintiff was not aware of. It was in fact the subject matter of an internal inquiry on 2 March 2011.

[30] The meeting was concluded with a finding that the treatment given to Henry Siang Len did not comply with the standard operating procedure. It is a medical error or malpractice to administer high dose of ketamine to Henry Siang Len at the material time and delay in taking the necessary action after knowing that Henry Siang Len was under the condition of ketamine overdose. This amounted to a serious medical malpractice in the emergency department. It is a significant finding which cannot be concealed.

[31] As such it is my view that there was an omission on the part of the plaintiff when they failed to inform the ketamine overdose incident when the MMIT was renewed in 2015. It was after all, a classic case of medical negligence by the medical staff of the plaintiff. It was the very nature of coverage that the plaintiff is seeking to be insured for. Yet, no information was disclosed about the incident.

[32] It is incumbent on the person in-charge of subscribing to the MMIT to ensure all information had been supplied. There seem to have been a breakdown in the sharing of information between the various departments within the plaintiff. The internal disconnect between the departments within the plaintiff cannot exonerate the plaintiff from discharging duties to disclose in the proposal form. Even if there was no such breakdown of communication between the departments, the failure to disclose the ketamine overdose incident was an error of judgment and a fatal omission by the plaintiff.

[33] Reasonable diligence ought to have been exercised by the plaintiff especially when it involves an insurance contract such as the MMIT. The monetary exposure to the plaintiff is sizeable if such an insurance plan is not taken out or is later denied.

[34] I also find it rather perplexing that there was such a non-disclosure, given the timing of the MMIT renewal and the request for information by Messrs PS Ranjan, the solicitors acting for Henry Siang Len. Lawyers do not come knocking on the door of hospitals without any apparent reason. It would raise further alarm bells when the information requested pertains to a case that was internally classified as medical negligence. It should therefore be within the reasonable contemplation of the plaintiff to highlight the said incident in the proposal form.

[35] It is my finding that the plaintiff was aware as early as 7 December 2015 that the Henry Siang Len incident was a circumstance that might give rise to a claim. However, the internal administrative processes failed to connect resulting in the said incident not being reported.

[36] It is my view that the plaintiff ought to have disclosed even if the possibility of litigation was remote.

[37] In summary I find that there was a duty on the part of the plaintiff to disclose. The disclosure is part of the wider *uberrimae fide* principle that permeates throughout insurance contracts.

The Second Issue: Whether Such Breach Would Entitle The Defendant To Repudiate The Contract

[38] As a recap, the MMIT subscribed by the plaintiff is an insurance to indemnify the plaintiff against any claim, *inter alia*, for actual or alleged breach of professional duty in provision of any medical service by reason of any act, error or omission committed or allegedly committed by the plaintiff provided that the alleged act or omission occurs after the retroactive date stated in the schedule. However, cl. 2.1.5 specifically states that:

> This certificate *will not indemnify the participant against any Claim* made against the participant prior to commencement of the Period of Takaful nor *in respect of* any claim(s) – or circumstance(s) notified under any previous policy/certificate, nor in respect of any claim(s) or *circumstance(s) which might give rise to a Claim which was known to the participant at the inception date of this takaful or which is stated on the proposed form, declaration or underwriting information being the basis of this takaful*: or
>
> (This exclusion relates to the act, error or omission from which the claim(s), or circumstance(s) known to the participant arises, irrespective of how, or whether that claim(s) or circumstances is declared to the company).
>
> (emphasis added)

[39] In simple terms, the clause specifically states that the certificate will not indemnify the plaintiff against any claim made against the plaintiff in respect of any complaint or circumstances which might give rise to a claim that was known to the plaintiff at the inception date of the insurance contract.

[40] With reference to the *Cambridge Dictionary*, the meaning of the word "might" is defined as "used to express the possibility that something will happen or be done, or that something is true although not very likely".

[41] During trial, PW1 in cross-examination admitted that she read all the terms and clauses of the insurance policy and agreed to them and specifically cl. 2.1.5. Having understood the clauses, I am of the view that it is the duty of the plaintiff to adhere to the strict duties of disclosure the clauses imposed on the plaintiff.

[42] It is my finding that the following incidents would have triggered the need to disclose. They are:

Clear Indication Of A Potential Suit

[43] Messrs PS Ranjan & Co wrote to the plaintiff requesting for copies of the medical record about a patient named Henry Siang Len. In this letter it shows that there was discussion between the plaintiff and Henry Siang Len's

solicitors as early at 15 October 2015 about Henry Siang Len incident. This would have indicated to the plaintiff that the representatives of Henry Siang Len were intending to bring a claim or action against the plaintiff. For clarity, an excerpt of the letter dated 7 December 2015 is reproduced and reads as follows:

> We refer to your letter of 15 October 2015 and our letter of 30 October 2015. We also refer to the recent telephone conversation between our Mr Rama and your Puan Surianti.

[44] This clearly leaves an indication that there might be a potential legal suit from Henry Siang Len. It was not a mere coincidental enquiry but an enquiry which had a follow up for documentation from the initial phone call.

Breach Of A Standard Operating Procedure

[45] An internal investigation meeting was held on 2 March 2011 to discuss the medical malpractice of the Henry Siang Len incident. The meeting was concluded with a finding that the treatment given to Henry did not comply with the standard operating procedure. It is a medical error or malpractice to administer high dose of ketamine to Henry Siang Len at the material time and delay in taking the necessary action after knowing that Henry Siang Len was under the condition of ketamine overdose. This resulted in serious medical malpractice in the emergency separtment.

[46] The internal investigation meeting minutes reads as:

> Rawatan yang diberi di dalam kes ini tidak mengikut 'Standard Operating Procedure'. Terdapat kesilapan dari segi memberikan dos Ketarnine dan kelewatan mengambil tindakan selanjutnya setelah mengetahui pesakit telah diberi Ketamine dengan dos yang tinggi. Ternyata berlaku kelemahan ketara dalam pengendalian pesakit di Jabatan Perubatan Kecemasan.

[47] A conclusion by a special inquiry team would alert a reasonable person that the plaintiff was exposed to a potential legal action. It was not a simulation of training exercise which could be lightly treated.

[48] In terms of timing, it is clear to my mind that the plaintiff was aware of the circumstance that might give rise to a claim prior to the inception date of the insurance contract. My finding is fortified by the admission made by PW1, the plaintiff's witness in a reply e-mail dated 13 March 2018 from PW1 addressed to Messrs Azim, Tunku Farik & Wong.

[49] In the e-mail, PW1 admitted becoming aware on 7 December 2015 that the Henry Siang Len incident is a circumstance that might give rise to a claim. The relevant portion of the e-mail dated 13 March 2018 at 5.07 pm which contains the admission of the plaintiff is reproduced as follows:

When did HUKM first become aware of a circumstance that may give rise to a claim?

07 December 2015 after received a letter from Messrs P.S Ranjan & Co dated 07 December 2015 asking for a copy of patient's medical record.

[50] The clear words of cl. 2.15 offers no refuge to any interpretation that there can be selective disclosure. As such, a claim such as the Henry Siang Len incident is clearly excluded under cl. 2.1.5. Suit 795 filed by Henry Siang Len is not covered under the MMIT. The defendant is therefore entitled to repudiate its liability or involvement in the said suit on the above grounds.

Other Issues

No Waiver Or Delay In Repudiating Liability

[51] It is important that the sequence of events be retraced. It is only on 13 March 2018 that Messrs Azim, Tunku Farik & Wong was informed about an internal investigation meeting being held on 2 March 2011 for the Henry Siang Len incident. Only at that juncture was the defendant made known of the said incident.

[52] It is my finding that the defendant had no inkling about the said internal investigation meeting and would not have discovered the Henry Siang Len incident being a circumstance known to the plaintiff at the inception date of the insurance contract that might give rise to a claim.

[53] Further, as admitted by the plaintiff *vide* PW1 in the e-mail dated 13 March 2018, the plaintiff became aware of the Henry Siang Len incident as a circumstance that might give rise to a claim on 7 December 2015. This was before the inception date of the insurance contract (8 December 2015). This fact was only disclosed to the defendant on 13 March 2018 *via* the reply e-mail from the plaintiff to Messrs Azim, Tunku Farik & Wong.

[54] It was only upon being aware of the above facts that it was apparent to the defendant that the Henry Siang Len incident was (i) excluded by cl. 2.1.5, (ii) a breach of the basis clause and (iii) a breach of the contractual duty of disclosure.

[55] Therefore, the acts or conducts of the defendant before knowing the above facts cannot be regarded as waiver, since the defendant was rendering under the false impression created by the plaintiff that the claim comes under the insurance contract. The timeline in which the defendant discovered the Henry Siang Len incident too does not suggest any delay on the part of the defendant in repudiating liability.

Discharge Of Messrs Azim, Tunku Farik & Wong A Non-issue

[56] The plaintiff complained that the discharge by Messrs Azim, Tunku Farik & Wong in Suit 795 had prejudiced them. I do not accept this argument as an argument that can place them in a better position to succeed in their current claim. This is simply because the appointment of Messrs Azim, Tunku Farik & Wong is without prejudice to the defendant's rights under the insurance contract which remain reserved at all material times.

[57] Reference is made to a letter dated 22 December 2016 from Messrs Azim, Tunku Farik & Wong addressed to the plaintiff at para. 6 which states:

> 6. Our appointment to defend you is without prejudice to our client's rights under the said policy which remain reserved at all material times.

[58] The plaintiff was made aware that the appointment of Messrs Azim, Tunku Farik & Wong for the conduct of the defence in the said suit was without prejudice to the defendant's right under the contract.

[59] The conduct of an insurer in taking over the action from the insured cannot be construed as a waiver of the insured's breach of the terms of the policy. It would be absurd to suggest that Messrs Azim, Tunku Farik & Wong must carry on defending the plaintiff as Messrs Azim, Tunku Farik & Wong's primary obligation is to the insurer/defendant. The defendant on the other hand, derives its right under the takaful contract.

[60] I therefore dismiss any notion of impropriety on the part of the defendant when it directed Messrs Azim, Tunku Farik & Wong to discharge themselves from acting for the plaintiff in Suit 795. There is no detrimental reliance on the plaintiff's part.

Conclusion

[61] In the foregoing, I find that the plaintiff has failed to discharge its burden of proving the claim. I accordingly dismiss the claim with costs.